Filed 8/20/13 In re J.A. CA6

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re J.A., a Person Coming Under the Juvenile Court Law.	H038500 (Monterey County Super. Ct. No. J46148)
THE PEOPLE, Plaintiff and Respondent, v. J.A., Defendant and Appellant.	

After separate petitions were filed in January and April 2012 alleging that J.A., a minor (15 years old at the time of the petitions' filing), came within the provisions of Welfare and Institutions Code section 602, the court found true the allegations that on three separate occasions, J.A. maliciously and willfully disturbed another person by a loud or unreasonable noise, which conduct would have constituted a misdemeanor had it been committed by an adult (Pen. Code § 415, subd. (2); § 415(2)).[1] The court declared the minor to be a ward of the court and placed her on probation for 24 months under various terms and conditions.

On appeal, the minor claims that there was insufficient evidence to support the true findings as to two of the counts because, she claims, there was no evidence of a loud

[1] All further statutory references are to the Penal Code unless otherwise stated.

and unreasonable noise disturbing other people. She also challenges the true findings as to all three counts on the ground that the findings violated her free speech rights under the First Amendment of the United States Constitution. Lastly, she challenges a probation condition concerning the possession or use of drugs and alcohol, claiming that it must be modified to include a requirement of her knowing possession or use of such substances.

We conclude that there was substantial evidence to support the court's true findings as to the two counts challenged on sufficiency-of-the-evidence grounds. We also reject the minor's First Amendment challenges to the true findings. We agree, however, that the probation condition should be modified to specifically include a knowledge requirement. We will therefore order the condition modified as indicated below. As so modified, we will affirm the dispositional order.

FACTS

I. *September 27, 2011 Incident*

At noontime on September 27, 2011, Laura Eras, assistant principal of Soledad High School, was called by security personnel to the multipurpose room that is generally used as a cafeteria. Also present in the multipurpose room were a school resource officer, Officer Leonel Munguia of the Soledad Police Department, and a family advocate and intervention specialist. The minor was with her friends at a lunch table. She was "[a]ngry, aggressive, [using] lots of . . . profanity, [and was] defiant."[2] There was "[l]ots of profanity directed at [Eras] directly and personally, most statements followed by [Eras's] last name." Eras testified that the level of the minor's voice was "[e]xtreme" and she could be heard over the general noise of the cafeteria. According to Officer Munguia, the minor was "[y]elling," saying "what the f[…]k," and accusing Eras of picking on her. Many students got up from their tables and moved away from the

[2] Eras testified that the minor said: "This is f[…]ing bullshit. This is f[…]ing idiocy. I hate this f[…]ing school. You're out to f[…]ing get me."

disturbance. Following the protocol of addressing matters with students in private, Eras asked the minor to come to the school office; she refused and used "[a] long stream of profanity."

The minor was eventually escorted to the school office. She continued to be defiant and to use profanity. Officer Munguia observed the minor being disrespectful by covering her ears while Eras was speaking to her. The minor was suspended from school and arrested by Officer Munguia. She admitted to the officer that she had been defiant and had used profanity.

II. *November 1, 2011 Incident*

A second incident occurred five weeks later, on November 1, 2011. On that day, at lunchtime, Eras was once again summoned to the multipurpose room and approached the minor, who was sitting with her friends. Eras approached the minor because of the minor's "history of cutting in line, throwing food, using electronics, [and causing] disruption." Eras was summoned because of the minor's use of electronics and because she did not comply with security. The minor was "[a]ngry, frustrated, [and] defiant" and was not speaking in a normal tone of voice. Eras asked the minor to accompany her to the office, but the minor was defiant and used "a long string of profanity." The minor eventually allowed Eras to accompany her to the office. When they got there, there was "[m]ore defiance, [and] disruption in the office, causing people to stop their work." Officer Munguia described the minor's conduct as "[u]pset, angry, [and] loud." The minor left the office without permission, and school personnel followed her around campus.

III. *January 25, 2012 Incident*

A third incident occurred on January 25, 2012. On that day, the minor came to the school office. She was defiant, disrespectful, rude, and refused multiple requests to hang up her cell phone. She used many "profanity-laden denials to public directives." Officer

Munguia, who was dispatched to the school regarding the minor, testified that the minor was communicating her displeasure about the school and about Eras in a loud voice and was using profanity.

PROCEDURAL BACKGROUND

On January 6, 2012, the Monterey County District Attorney filed a petition with the juvenile court under Welfare and Institutions Code section 602, subdivision (a). It was alleged in the petition that the minor had committed two offenses that, had they been committed by an adult, would have been misdemeanors, namely, two counts of maliciously disturbing another person on school grounds by loud and unreasonable noise (§ 415.5, subd. (a)). The court, on the People's motion, dismissed the two counts and permitted an amendment to the petition to allege two misdemeanor counts of maliciously and willfully disturbing another person by loud and unreasonable noise arising out of events occurring on September 27, 2011, and November 1, 2011 (§ 415(2); counts 3 and 4). On April 2, 2012, the District Attorney filed a second petition under Welfare and Institutions Code section 602, subdivision (a), alleging that the minor had committed an offense on January 25, 2012, that, had it been committed by an adult, would have been a crime, namely, maliciously and willfully disturbing another person by loud and unreasonable noise, a misdemeanor (§ 415(2); count 1).

A jurisdictional hearing was held on the petitions on June 15, 2012. After testimony and the denial of the minor's motion to dismiss pursuant to Welfare and Institutions Code section 701.1, the court found true beyond a reasonable doubt the three counts of violating section 415(2), namely, counts 3 and 4 alleged in the January 6, 2012 petition, and count 1 in the April 2, 2012 petition.[3] The court adjudged the minor to be a

[3] The minor's appellate counsel erroneously refers to the two counts for which he asserts sufficiency-of-the-evidence challenges—namely, count 4 of the January 6, 2012 petition (arising out of the November 1, 2011 incident) and count 1 of the April 2, 2012

ward of the court. She was ordered to serve 47 days in juvenile hall (with 32 days of credit for time served and with the remaining 15 days served under home supervision) and to thereafter be in the custody of her mother. She was also granted probation for a term of 24 months, subject to various terms and conditions. The minor filed a timely notice of appeal.

DISCUSSION

I. *Sufficiency of the Evidence*

A. *Standard of Review*

Our determination of whether substantial evidence supports the judgment is based upon whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; see also *People v. Johnson* (1980) 26 Cal.3d 557, 576.) "In making this determination, the appellate court ' "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." [Citations.] . . . "[O]ur task . . . is twofold. First, we must resolve the issue in the light of the *whole record* . . . . Second, we must judge whether the evidence of each of the essential elements . . . is *substantial* . . . ." ' [Citation.]" (*People v. Barnes* (1986) 42 Cal.3d 284, 303; see also *People v. Snow* (2003) 30 Cal.4th 43, 66.) "Evidence, to be 'substantial' must be 'of ponderable legal significance . . . reasonable in nature, credible, and of solid value.' [Citations.]" (*People v. Johnson*, *supra*, at p. 576.)

We thus do not evaluate whether, from our perspective, "the evidence at the trial established guilt beyond a reasonable doubt," but, rather, whether the record reasonably supports such a finding. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; see also *People*

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petition (arising out of the January 25, 2012 incident)—as "count 2" and "count 3," respectively.

v. Ceja (1993) 4 Cal.4th 1134, 1139 [if jury's findings are reasonably justified by circumstances, appellate court "may not reverse the judgment merely because it believes that the circumstances might also support a contrary finding"].) "[I]f the verdict is supported by substantial evidence, this court must accord due deference to the trier of fact and not substitute its evaluation of a witness's credibility for that of the fact-finder." (*People v. Barnes*, *supra*, 42 Cal.3d at pp. 303-304; see also *People v. Kraft* (2000) 23 Cal.4th 978, 1053.) The same standard applies, irrespective of whether the conviction was based on direct or circumstantial evidence. (*People v. Towler* (1982) 31 Cal.3d 105, 118.) We are required to " 'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence' " and we are precluded from reversing unless "upon no hypothesis whatever" does substantial evidence support the order. (*In re Ryan N.* (2001) 92 Cal.App.4th 1359, 1372.)

These principles invoked to scrutinize criminal convictions apply equally to the review of juvenile proceedings. (*In re Roderick P.* (1972) 7 Cal.3d 801, 808-809.)

B. *Substantial Evidence to Support Count 4 (November 1, 2011)*

The minor argues that there was insufficient evidence to support the true finding as to count 4 of the January 6, 2012 petition, as amended (concerning the November 1, 2011 incident). Specifically, she claims that there was no evidence to support the conclusion that she made a loud noise causing a disturbance to another person on November 1, 2011, either in the multipurpose room or later in the office.

Section 415(2) criminalizes the conduct of "[a]ny person who maliciously and willfully disturbs another person by loud and unreasonable noise."[4] Our high court has

[4] "Any of the following persons shall be punished by imprisonment in the county jail for a period of not more than 90 days, a fine of not more than two hundred dollars ($200), or both such imprisonment and fine: (1) Any person who unlawfully fights in a public place or challenges another person in a public place to fight. (2) Any person who maliciously and willfully disturbs another person by loud and unreasonable noise.

interpreted the statute as prohibiting "loud 'noise' . . . only in two situations: 1) where there is a clear and present danger of imminent violence and 2) where the purported communication is used as a guise to disrupt lawful endeavors." (*In re Brown* (1973) 9 Cal.3d 612, 621 (*Brown*); see also *In re Curtis S.* (2013) 215 Cal.App.4th 758 (*Curtis S.*).) These two situations are separate and distinct, i.e., the loud noise is prohibited under section 415(2) "where there is a clear and present danger of imminent violence" or "where the purported communication is used as a guise to disrupt to disrupt lawful endeavors." (*Brown*, at p. 621; see *People v. Superior Court (Commons)* (1982) 135 Cal.App.3d 812, 817 [criminal defendant's laughing and loud shouting in hotel hallway at approximately 1:00 a.m. in response to police officers' investigation of suspected prostitution was a guise to disrupt lawful endeavors and constituted probable cause for his arrest under section 415(2)]; see also CALCRIM No. 2689.)

We examine the entire record and give due deference to the trier of fact to determine whether there was substantial evidence that the minor's conduct, if committed by an adult, would have constituted a violation of section 415(2). (See *People v. Barnes*, *supra*, 42 Cal.3d at p. 303; cf. *In re Alejandro G.* (1995) 37 Cal.App.4th 44, 49 [to determine whether there was sufficient evidence that offensive words likely to provoke immediate violent reaction were uttered in public in violation of section 415 subdivision (3), appellate court "must consider the totality of the circumstances, including the status of the addressee"].) The evidence presented included Eras's testimony that she went to the multipurpose room because of the minor's noncompliance with security and based upon her "history of cutting in line, throwing food, using electronics, [and causing] disruption." Eras testified that the minor was "[a]ngry, frustrated, [and] defiant" and was not speaking in a normal tone of voice. After Eras asked the minor to accompany her to

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(3) Any person who uses offensive words in a public place which are inherently likely to provoke an immediate violent reaction." (§ 415.)

the office—consistently with school policy of resolving matters with students in private outside the presence of the student's peers—the minor responded with more defiance and used "a long string of profanity." Additionally, after the minor went with Eras to the office, she continued to be defiant, angry, disruptive, and loud.

This uncontroverted testimony—contrary to the minor's assertions—constituted substantial evidence that the minor had, *on two separate occasions* on November 1, 2011, "willfully disturb[ed] another person [Eras] by loud and unreasonable noise" (§ 415(2)). Further, there was substantial evidence that the minor's purported communication was "used as a guise to disrupt lawful endeavors" of the high school assistant principal, Eras, in violation of the statute. (*Brown*, *supra*, 9 Cal.3d at p. 621.) We therefore reject the minor's sufficiency-of-the-evidence challenge.[5]

C. *Substantial Evidence to Support Count 1 (January 25, 2012)*

The minor also argues that there was insufficient evidence to support the true finding as to count 1 of the April 2, 2012 petition (concerning the January 25, 2012 incident). She contends that there was no evidence that she was loud on January 25, 2012. Specifically, she argues that neither Eras nor Officer Munguia offered any testimony concerning "the volume of [J.A.'s] voice on that occasion."

The Attorney General responds that there was, in fact, evidence of the minor's loudness, namely, Officer Munguia's testimony that the minor was loud and was using profanity while she was in the office. In her reply, the minor takes issue with this

[5] Neither the minor nor the Attorney General argue on appeal that the minor's speech here falls within the other described situation in which the loud noise may constitute a violation of section 415(2)—i.e., "where there is a clear and present danger of imminent violence (*Brown*, *supra*, 9 Cal.3d at p. 621). Accordingly, we are only concerned with whether there was sufficient evidence that the minor made a loud and unreasonable noise "where the purported communication [was] used as a guise to disrupt lawful endeavors." (*Ibid.*)

assertion, arguing that the Attorney General's only citation to the record concerning the minor's loudness is the introductory portion of a compound question; she continues to claim there was no testimony from Officer Munguia that the minor was loud.

The portion of the reporter's transcript to which the minor objects here and which she asserts does not support a finding that she was loud involves a single question to Officer Munguia *by the minor's attorney*, Jeremy Dzubay. That passage reads: "[Q:] And when you went on the—in January, was she [the minor], when she was being loud and using profanity, was she also communicating her displeasure about the school and Ms. Eras? [¶A:] Yes." The fact that the question may have been objectionable as compound does not preclude us from considering the response as evidence. It is a fundamental rule of practice, codified under Evidence Code section 353,[6] that a party forfeits a challenge on appeal to evidence where he or she failed to object to the evidence at trial. " '[W]e have consistently held that the "defendant's failure to make a timely and specific objection" on the ground asserted on appeal makes that ground not cognizable.' [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 433-434.) Not only was there no objection to the question by the minor; it was a question *posed by the minor's counsel, himself*. The minor has therefore forfeited the objection.

It is a well-settled rule that evidence, though objectionable, may nevertheless be considered on appeal where no objection thereto was made at trial. (*People ex rel. Dept. of Public Works v. Alexander* (1963) 212 Cal.App.2d 84, 98; see also Evid. Code, § 140,

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[6] "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and [¶] (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice." (Evid. Code, § 353.)

Law Rev. Com. Comment: " 'Evidence' is defined broadly to . . . include[] anything offered in evidence whether or not it is technically inadmissible . . . [, including] hearsay which may be excluded as inadmissible but which may be admitted if no proper objection is made. . . .[¶] . . . [T]he general principle is well established that matter which is technically inadmissible under an exclusionary rule is nonetheless evidence and may be considered in support of a judgment if it is offered and received in evidence without proper objection or motion to strike.") Thus, a variety of kinds of evidence may be considered in reviewing a judgment, notwithstanding its objectionable nature, where no objection was made at trial. (See, e.g., *Sublett v. Henry's Turk & Taylor Lunch* (1942) 21 Cal.2d 273, 275-276 [use of secondary evidence of contract terms in violation of best evidence rule]; *Flood v. Simpson* (1975) 45 Cal.App.3d 644, 649 [hearsay or other incompetent evidence in affidavit considered]; *Bank of America Nat. Trust & Sav. Ass'n v. Taliaferro* (1956) 144 Cal.App.2d 578, 582 [contract introduced without foundation by showing its execution and delivery].) For instance, in a case in which the evidence consisted of a witness's volunteered testimony that was beyond the scope of the question, the court rejected the challenge and considered the evidence because no objection was made below. (*Holzer v. Read* (1932) 216 Cal. 119, 123.) The court held: "Where, as here, the insufficiency of the evidence is the question to be determined, full weight must be given to evidence which would have been excluded had objection been made . . . Evidence may tend to prove the issues and yet be incompetent. [Citation.]" (*Ibid.*; see also *People v. Farnam* (2002) 28 Cal.4th 107, 197 [prosecutor's compound question purporting to summarize the defendant's testimony was not misconduct, even though it may have been objectionable or the defendant, had he disagreed with any part, "could easily have said so instead of responding '[y]es' "].)

Having considered the evidence in the record before us, we conclude that substantial evidence supported the court's true finding as to count 1 of the April 2, 2012

petition. While she was in the school office, the minor was defiant, disrespectful, and rude. She refused multiple requests to hang up her cell phone, and, according to Eras's unrefuted testimony, the minor used many "profanity-laden denials to public directives." Officer Munguia testified that she was loud and using profanity.

We reject the minor's assertion that we must disregard the officer's testimony concerning her loudness because it was based upon an objectionable compound question. She did not object to the question below; in fact, she was the party who posed it. Finally, given that, shortly before his testimony regarding the January 25, 2012 incident, Officer Munguia had testified that the minor had been loud in the two previous encounters with Eras at the school, it is apparent that both the minor's counsel and Officer Munguia simply adopted as a shorthand that she was similarly loud and profane during the third occasion.[7] This was sufficient evidence that the minor was loud in her interactions with Eras on January 25, 2012. (See *Holzer v. Read*, *supra*, 216 Cal. at p. 123.) Therefore, considering the evidence with deference to the trial court and in a light most favorable to the People (*People v. Barnes*, *supra*, 42 Cal.3d at p. 303), we conclude that there was substantial evidence that the minor's conduct on January 25, 2012, had it been committed by an adult, would have constituted a violation of section 415(2).

II. *First Amendment Claim*

[7] We observe that the minor's counsel at no time argued—either in support of his motion to dismiss or in closing argument—that the prosecution had failed to meet its burden of showing that the minor was loud on January 25, 2012. Rather, counsel's argument centered on the prosecution's alleged failure to show that the noise caused by the minor, had it been made by an adult, would have been punishable under section 415(2) as having been for the purpose of disrupting lawful activities, rather than communication permissible under the First Amendment. This is consistent with the apparent strategy of the minor's counsel of conceding that the element of loudness as to each of the three counts was satisfied.

The minor also challenges the true findings as to each of the three counts on constitutional grounds. She contends that under *Brown, supra,* 9 Cal.3d at page 621, she could not be found to have committed acts which, if committed by an adult, would have been violations of section 415(2) through loud noise consisting of speech, unless it either (1) posed "a clear and present danger of imminent violence[, or (2) was] . . .used as a guise to disrupt lawful endeavors." The minor argues that her speech fell within neither such category. Rather, she contends, she "was criminally punished for speech that opposed school authority . . . [and therefore] was punished for speech protected under the First Amendment."

Because the minor "raises a plausible First Amendment defense," we will conduct "an independent examination of the record . . . to ensure that a speaker's free speech rights have not been infringed by a trier of fact's determination that the communication at issue constitutes a [crime]." (*In re George T.* (2004) 33 Cal.4th 620, 632.) Based upon that independent review, we reject the minor's challenge.

It is plain that the minor's conduct did not present "a clear and present danger of imminent violence" required to satisfy the first situation described in *Brown, supra,* 9 Cal.3d at page 621 under which the loud or unreasonable noise could constitute a violation of section 415(2). But it is nonetheless true that in each instance, the minor's speech was "used as a guise to disrupt lawful endeavors" (*ibid.*), thereby satisfying the second situation described in *Brown* under which the purported communication may violate section 415(2). On each of the three occasions, the minor responded to the school vice principal's attempts to address disciplinary and security issues with loud and profane defiance. The minor's response to Eras's efforts consisted of "[a] long stream of profanity" (on September 27, 2011), "a long string of profanity (on November 1, 2011), and "profanity-laden denials to public directives" (on January 25, 2012). "Loud shouting . . . designed to disrupt rather than communicate may be prohibited generally." (*Ibid.*)

On this record, the minor's loud noise, rather than constituting speech opposing authority that was protected under the First Amendment, was "used as a guise to disrupt lawful endeavors" of school officials and thus appropriately subject to proscription under section 415(2). (*Ibid.*)

The recent case of *Curtis S., supra*, 215 Cal.App.4th 758, is instructive. There, the evidence was that the minor, after taking the cell phone of another juvenile, was confronted by a passerby who told him to return the phone to its owner. (*Id.* at p. 760.) The minor denied that he had the phone, became very angry, and called the woman "a 'bitch' several times." (*Ibid.*) He also attempted to strike her after she tried to physically detain him. (*Ibid.*) Two witnesses testified that "the [m]inor's behavior appeared to be very aggressive towards [the woman], and his voice had an offensive and loud tone" and she was fearful and upset. (*Ibid.*) The minor was charged with, inter alia, a violation of section 415(2); as here, he claimed that his speech was communicative and was protected by the First Amendment. (*Curtis S.*, at pp. 761-762.)

After an independent review of the evidence, the appellate court in *Curtis S.* held that the record supported the finding that the minor had violated section 415(2). It reasoned that the "speech presented a clear and present danger of imminent violence and was designed to disrupt a lawful endeavor," namely, the woman's reasonable attempts to prevent the minor from committing the theft of another's cell phone and from fleeing the scene. (*Curtis S.*, 215 Cal.App.4th at p. 762.) Thus, in *Curtis S.*, the court found that the evidence was sufficient under *both* distinct situations described in *Brown, supra*, 9 Cal.3d at page 621 under which the loud or unreasonable noise may constitute a violation of section 415(2).

While the minor here was not physically confrontational and neither party here argues that the minor's speech presented a clear and present danger of imminent violence, her speech, like the minor's in *Curtis S.*, "was a guise to disrupt [Eras's] lawful

endeavors" and was therefore not protected by the First Amendment. (*Brown*, *supra*, 9 Cal.3d at page 621; cf. *People v. Superior Court (Commons)*, *supra*, 135 Cal.App.3d at pp. 817-818 [probable cause existed for the defendant's arrest under section 415(2), where his late-night public laughing and loud shouting in disruption of police officers' investigation was a guise to disrupt their lawful endeavors].) We therefore reject the minor's contention that the underlying conduct supporting the true findings as to the three section 415(2) counts constituted speech protected under the First Amendment.[8]

III. *Probation Condition*

A. *Applicable Law*

A juvenile court is empowered to impose upon a ward placed on probation "any and all reasonable conditions that it may determine fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced." (Welf. & Inst. Code, § 730, subd. (b).) "The juvenile court has wide discretion to select appropriate conditions and may impose ' "any reasonable condition that is 'fitting and

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[8] The minor cites *Tinker v. Des Moines School Dist.* (1969) 393 U.S. 503 and *City of Houston v. Hill* (1987) 482 U.S. 451 in support of her constitutional claim. Neither case is helpful to her position. *Tinker* held that "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." (*Tinker*, at p. 513.) Under this standard, the minor's conduct here was not constitutionally protected. In *Hill*, the Supreme Court addressed the constitutionality of an ordinance prohibiting speech that " 'in any manner . . . interrupt[s]' " a police officer. (*Hill*, at p. 462.) The court, noting that it had "repeatedly invalidated laws that provide the police with *unfettered discretion* to arrest individuals for words or conduct that annoy or offend them" (*id.* at p. 465, italics added), invalidated the ordinance on the grounds of its overbreadth because it "criminalize[d] a substantial amount of constitutionally protected speech, and accord[ed] the police unconstitutional discretion in enforcement" (*id.* at p. 467). Here, unlike in *Hill*, we are not concerned with a law that grants unfettered discretion to the police to arrest someone merely for conduct or speech that is simply an annoyance or is offensive.

proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.' " ' [Citations.]" (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*).) This discretion is in fact broader with respect to the imposition of probation conditions for juveniles than it is for adult offenders. (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1152; see also *Sheena K.*, at p. 889 [probation condition that may be unconstitutional for adult offender may be permissible for minor under juvenile court's supervision].)

Both adult offenders and juveniles may challenge a probation condition on the grounds that it is unconstitutionally vague or overly broad. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 887.) As we have explained: "Although the two objections are often mentioned in the same breath, they are conceptually quite distinct. A restriction is unconstitutionally vague if it is not ' "sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated." ' [Citation.] A restriction failing this test does not give adequate notice—"fair warning"—of the conduct proscribed. [Citations.] A restriction is unconstitutionally overbroad, on the other hand, if it (1) 'impinge[s] on constitutional rights,' and (2) is not 'tailored carefully and reasonably related to the compelling state interest in reformation and rehabilitation.' [Citations.] The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.*, *supra*, 188 Cal.App.4th at p. 1153; see also *In re Victor L.* (2010) 182 Cal.App.4th 902, 910.)

Any objection to the reasonableness of a probation condition is forfeited if not raised at the time of imposition. (See *In re Justin S.* (2001) 93 Cal.App.4th 811, 814; see also *Sheena K.*, *supra*, 40 Cal.4th at p. 883, fn. 4; *People v. Welch* (1993) 5 Cal.4th 228,

237.) Constitutional challenges to probation conditions on their face, however, may be raised on appeal without objection in the court below. (*Sheena K.*, at pp. 887-889.)

B. *Drugs and Alcohol Condition*

The minor challenges a probation condition imposed by the court that relates to drugs and alcohol. That condition reads, in pertinent part: "You are not to consume or possess any intoxicants, alcohol, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs, including marijuana."[9] She argues that the condition "is vague and overbroad because it does not include a requirement that [J.A.] *know* the circumstances that would violate her probation." (Original italics.) The Attorney General indicates that she does "not object to the probation condition being amended to provide that appellant not *knowingly* consume or possess any" drugs or alcohol. (Original italics.)

The minor did not raise this challenge below. But because her claim is that the probation condition is unconstitutional, it is cognizable on appeal. (*Sheena K.*, *supra*, 40 Cal.4th at pp. 887-889.)

"A probation condition 'must be sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated,' if it is to withstand a [constitutional challenge on the ground of vagueness. [Citation.]" (*Sheena K.*, *supra*, 40 Cal.4th at p. 890.) As we have observed, "[I]n a variety of contexts . . ., California appellate courts have found probation conditions to be unconstitutionally vague or overbroad when they do not require the probationer to have knowledge of the prohibited conduct or circumstances." (*People v. Kim* (2011) 193 Cal.App.4th 836, 843.) Thus, probation conditions that fail to include language requiring the probationer's knowing violation of the condition have been invalidated in the context

[9] The paragraph in which the challenged probation condition appears consists of five sentences. The minor challenges only the first sentence of that paragraph.

of prohibitions on association with felons, ex-felons, or narcotics dealers or users (*People v. Garcia* (1993) 19 Cal.App.4th 97, 102); association with gang members (*People v. Lopez* (1998) 66 Cal.App.4th 615, 628); association with probationers, parolees, or gang members (*In re H.C.* (2009) 175 Cal.App.4th 1067, 1071); association with persons under 18 (*People v. Turner* (2007) 155 Cal.App.4th 1432, 1437); frequenting areas of gang-related activity (*People v. Leon* (2010) 181 Cal.App.4th 943, 952); possessing stolen property, or possessing firearms or ammunition (*People v. Freitas* (2009) 179 Cal.App.4th 747, 751-752); and possessing, wearing or displaying gang-affiliated material (*In re Vincent G.* (2008) 162 Cal.App.4th 238, 245, 247-248).

We acknowledge, as noted by the Attorney General, that the Third District Court of Appeal, expressing concern over the repetitive nature of constitutional challenges to probation conditions and their drain upon judicial resources, has indicated that it would not entertain future challenges to probation conditions based upon their failure to include an express knowledge requirement. (See *People v. Patel* (2011) 196 Cal.App.4th 956, 960.) We decline to follow the Third District's approach. (See *People v. Moses* (2011) 199 Cal.App.4th 374, 380-381 [declining to follow *Patel*, adding knowledge requirement to probation condition].) Instead, we will order the probation condition modified to include a specific knowledge requirement. (*Sheena K.*, *supra*, 40 Cal.4th at p. 892 ["modification to impose an explicit knowledge requirement is necessary to render [a probation] condition constitutional"].) We will order the first sentence of the challenged probation condition modified to read (with the modifications italicized): "You are not to *knowingly* consume or *knowingly* possess any intoxicants, alcohol, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs, including marijuana."[10]

[10] Our colleague in her concurring and dissenting opinion concludes that "probation conditions prohibiting possession or consumption of regulated items should be

DISPOSITION

The dispositional order is modified to modify the first sentence of the drugs and alcohol probation condition to read as follows: "You are not to knowingly consume or knowingly possess any intoxicants, alcohol, narcotics, other controlled substances, related paraphernalia, poisons, or illegal drugs, including marijuana." As so modified, the dispositional order is affirmed.

Márquez, J.

I CONCUR:

Rushing, P.J.

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understood to contain an implicit scienter element." (Conc. opn., p. 4.) As we have noted, *ante*, Courts of Appeal in a number of instances have invalidated probation conditions that have failed to include language requiring the probationer's knowing violation of the condition. Not all of these cases have concerned probation conditions implicating constitutional rights. (See, e.g., *People v. Freitas*, *supra*, 179 Cal.App.4th at pp. 751-752; *In re Vincent G.*, *supra*, 162 Cal.App.4th at pp. 245, 247-248.) We agree with our concurring and dissenting colleague that *Sheena K.*, *supra*, 40 Cal.4th 875, addressed a probation condition different from the one challenged here. But we believe that the constitutional principles concerning probation conditions generally that were enunciated by the Supreme Court in *Sheena K.*—including the due process requirement that the "probation condition '. . . be sufficiently precise for the probationer to know what is required of him . . .' " (*id.* at p. 890)—require that there be a knowledge element explicitly included in the condition here. Just as in *People v. Freitas*, at page 752, where the court held that a guns/ammunition probation condition should include a scienter requirement because "the law has no legitimate interest in punishing an innocent citizen who has no knowledge of the presence of a firearm or ammunition," the minor in this case should not be punished unless she *knowingly* consumes or possesses drugs or alcohol.

Grover, J., Concurring and Dissenting

I concur in affirming the jurisdictional order; however, I respectfully dissent from the modification of that order. I write separately to address the drugs and alcohol probation condition discussed in section III. B. of the majority opinion. In *People v. Kim* (2011) 193 Cal.App.4th 836 (*Kim*), this court did not accept the Attorney General's concession to add an explicit knowledge requirement to a probation condition restricting possession of firearms and ammunition (*id*. at p. 847.); similarly here, I would not accept the conceded modification to add an explicit reference to "knowing[]" drug and alcohol consumption or possession, because I believe the requirement that a probationer have knowledge of violating conduct is implied in such a condition.

The majority cites *In re Sheena K.* (2007) 40 Cal.4th 875, 892 as requiring an explicit knowledge term in order to make the condition here constitutional. At issue in *Sheena K.* was a probation condition proscribing conduct completely within the probation officer's subjective discretion, namely, not associating with "anyone disapproved of by probation." (*Id.* at p. 878.) A knowledge requirement is needed in such a probation condition to ensure reasonable notice of which persons are to be avoided. Indeed, most probation conditions restricting association depend on avoiding a type of person based on some characteristic that may or may not be outwardly apparent.

A seminal case on the issue of probation conditions prohibiting association is *People v. Garcia* (1993) 19 Cal.App.4th 97, which was cited with approval in *Sheena K.* In *Garcia*, the court determined that a condition barring association with " 'any felons, ex-felons, users or sellers of narcotics' " (*Id.* at p. 100) was an unconstitutionally overbroad infringement on freedom of association absent an explicit knowledge requirement. (*Id.* at p. 102.) In rejecting the Attorney General's invitation to construe the challenged condition as containing an implicit scienter requirement, the court noted "the rule that probation conditions that implicate constitutional rights must be narrowly drawn, and the importance of constitutional rights, lead us to the conclusion that this

factor should not be left to implication." (*Ibid.*) In my view, neither *Garcia* nor *Sheena K.*, nor cases following those authorities to add a knowledge requirement to conditions prohibiting *association*, stand for the proposition that scienter must be explicit in probation conditions *generally* when no constitutional right is at stake; certainly statutes are not held to this standard.

It is well established that an individual will not be subject to criminal sanctions without proof of a mental state corresponding to the prohibited conduct. As the California Supreme Court has explained, "the requirement that, for a criminal conviction, the prosecution prove some form of guilty intent, knowledge, or criminal negligence is of such long standing and so fundamental to our criminal law that penal statutes will often be construed to contain such an element despite their failure expressly to state it. 'Generally, " '[t]he existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.' . . . [Citation.] In other words, there must be a union of act and wrongful intent, or criminal negligence. (Pen. Code, § 20; [citation].)' " (*In re Jorge M.* (2000) 23 Cal.4th 866, 872, quoting *People v. Coria* (1999) 21 Cal.4th 868, 876.) "[A]t least where the penalties imposed are substantial, [Penal Code] section 20 can fairly be said to establish a presumption against criminal liability without mental fault or negligence, rebuttable only by compelling evidence of legislative intent to dispense with mens rea entirely." (*Id.* at p. 879.)

It is similarly established that a probation violation must be willful to justify revocation of probation. (*People v. Zaring* (1992) 8 Cal.App.4th 362, 379 [probationer 22 minutes late to court]; *People v. Galvan* (2007) 155 Cal.App.4th 978, 982 [failure to report due to deportation]; *People v. Cervantes* (2009) 175 Cal.App.4th 291, 295 [failure to appear for review hearing because in federal custody].) Noncompliance is not willful when it is attributable to circumstances beyond the probationer's control. (*Id.* at p. 295.)

Nonpayment is not willful unless the probationer has the ability to pay. (*People v. Quiroz* (2011) 199 Cal.App.4th 1123, 1129; Pen. Code, § 1203.2, subd. (a).)

The concern in *Garcia* about overbroad infringement on a constitutional right, and the concern in *Sheena K.* about vagueness and adequate notice of proscribed behavior arose in the context of probation conditions prohibiting association, a core First Amendment right. In contrast, a condition prohibiting the possession and consumption of drugs and alcohol by a minor does not directly implicate a constitutional right. Where there is no infringement of constitutional rights, a condition's breadth is bounded only by its reasonable relationship to the underlying criminal offense and to preventing future criminality. (*People v. Lent* (1975) 15 Cal.3d 481, 486; *People v. Olguin* (2008) 45 Cal.4th 375, 379.) Similarly, vagueness need not be a concern when knowledge is reasonably implicit in a condition's wording.

"A probation condition should be given 'the meaning that would appear to a reasonable, objective reader.' " (*Olguin, supra,* 45 Cal.4th 375, 382.) When a probation condition incorporates a statute by reference, the condition should be interpreted as including whatever mental element is implicit in the statute. In *Kim, supra,* 193 Cal.App.4th 836, cited by the majority, the probation condition made express reference to weapon possession statutes that had already been construed to have an implicit mental element. *Kim* concluded that the probation condition similarly had an implicit mental element, disagreeing with one of the conclusions in *People v. Freitas* (2009) 179 Cal.App.4th 747, on which the majority here relies. However, the logic of *Kim* is not dependent on express incorporation by reference. (Contra, *People v. Moore* (2012) 211 Cal.App.4th 1179, 1189, fn. 8.) As long as a reasonable reader would understand a condition to be intended to implement one or more criminal statutes, the statute's mental element should be inferred in enforcing the condition. I see no reason to

construe the same prohibition differently when it appears in a statute versus a probation condition.

It is my view that probation conditions prohibiting possession or consumption of regulated items should be understood to contain an implicit scienter element, just as Health and Safety Code sections regulating controlled substances have been interpreted. "[A]lthough criminal statutes prohibiting the possession, transportation, or sale of a controlled substance do not expressly contain an element that the accused be aware of the character of the controlled substance at issue ([Health & Saf. Code,] §§ 11350-11352, 11357-11360, 11377-11379), such a requirement has been implied by the courts." (*People v. Coria, supra,* 21 Cal.4th 868, 878.) "The essential elements of unlawful possession of a controlled substance are 'dominion and control of the substance in a quantity usable for consumption or sale, with knowledge of its presence and of its restricted dangerous drug character.' " (*People v. Martin* (2001) 25 Cal.4th 1180, 1184.) As there is no constitutional right to possess or consume controlled substances or to possess paraphernalia for their use, a probation condition prohibiting such conduct should be understood to include the knowledge requirement implicit in the corresponding statutes.

I am not convinced that the Constitution requires more explicit clarity in probation conditions than in penal statutes. The challenged condition in this case does not infringe on any constitutional right. The condition is reasonably understood to prohibit behavior that would also violate Health and Safety Code sections 11350 and 11377 [controlled substance possession], 11357 [marijuana possession], 11364.1 [drug paraphernalia possession], and 11550 [controlled substance consumption]; Vehicle Code section 23152 [driving under the influence]; Penal Code section 647, subdivision (f) [public intoxication]; and Business and Professions Code section 25662 [alcohol possession under age 21], among others. I believe the probation condition modified by the majority

already contains the mental element implicit in those statutes, and there is no constitutional requirement to make that element explicit.

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Grover, J.